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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1095

EDGAR W. DICKENSON, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 353 F. 2d 389.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1965. A petition for rehearing was denied on January 6, 1966. On February 3, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including March 5, 1966, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence showed that petitioner's employees were covered by the Fair Labor Standards Act.

2. Whether the government was required to prove violations for any particular "work week" and failed to do so.

3. Whether the question of petitioner's claimed exemption from the application of the Act under Section 213(a)(2) (exempting a "retail establishment") was properly resolved in the trial court.

4. Whether 29 U.S.C. 213(a)(2) is unconstitutionally vague.

STATUTE INVOLVED

29 U.S.C. 213 provided in pertinent part as follows:

> (a) The provisions of sections 206 and 207 shall not apply with respect to—
>
> * * * *
>
> (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;
>
> * * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of submitting false receipt forms to the Department of Labor (count 1), paying less than the required wages (counts 2 and 3), keeping false and incomplete records (counts 4 and 5) and shipping goods produced by underpaid workers in interstate commerce (count 6), in violation of the Fair Labor Standards Act, 29 U.S.C. 215(a)(1), 215(a)(5) and 216(a) (R.A. 2-8).[1] He was fined $1000 on each of four counts, placed on 6 months' probation, and directed to pay back wages to the employees named in the information (R.A. 68).

During the period in question, petitioner was in the business of receiving and wrecking used automobiles, selling new and used automobile parts, and producing scrap metal from wrecked automobiles in San Diego, California (Tr. 93-95, 300, 550-553). It was stipulated that the scrap metal, which petitioner sold to a scrap dealer, was shipped by that dealer in foreign commerce (Tr. 277-279, 688; Ex. 12).[2] There was testimony that several of the employees named in the information delivered scrap metal or loaded the delivery truck once or twice a week (Tr. 93-95,

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[1] "R.A." refers to the record on appeal which is designated as volume I and is independently paginated. "Tr." refers to the transcript of trial which is paginated consecutively. It constitutes volumes II thru V.

[2] Petitioner testified that the cash volume of scrap sold was $284 in 1959, $145 in 1960 and $84 in 1961 (Tr. 388-89).

160, 166-167, 175-176, 388). Other employees stated they stripped parts from the cars, moved the scrap or guarded it (Tr. 66, 247-248).

1. The evidence relevant to the charge of submitting false receipts showed that petitioner consented to being adjudged in civil contempt in the United States District Court for the Southern District of California for violation of an injunction entered by that court on January 11, 1956, ordering him to refrain from violating the wage provisions of the Fair Labor Standards Act (Tr. 25, 639-40; Ex. 25). The agreed-upon contempt decree ordered petitioner to pay $231.00 to Richard Madrigal, $306.00 to Agapeto Martinez and $202.12 to William Roberts (Tr. 25, 26, 27, 640; Ex. 25). Petitioner subsequently submitted to the Department of Labor their official receipt forms signed by him and allegedly signed by each of the named employees for the stated amounts, less taxes (Tr. 29, 30, 32, 35; Exs. 1, 2, 3). Madrigal testified that he actually received only $8.64 when he signed the receipt (Tr. 64). Martinez stated that he received nothing when he signed the receipt after petitioner, on his way to court, requested that Martinez "help him out" (Tr. 198). Roberts testified that he received no money and that he did not sign the receipt bearing his name (Tr. 47, 49). Roberts stated that he was unable to write at the time of his alleged signing because he was then recovering from a recent stroke (Tr. 48, 296).

Petitioner admitted that he had paid only $8.64 of the $738 agreed upon in the contempt order, but con-

tended that he took valid set-offs for cash advances and loans made to these employees (Tr. 309-314, 386-387, 462-463). Petitioner did not inform the Department of Labor about the extensive deductions until the third visit of a Department investigator, over a year and one-half after the filing of the receipts (Tr. 476-479). On the investigator's initial visit, shortly after the receipts were submitted, petitioner told the investigator that Roberts had cashed his check with him and that Madrigal had been paid the full amount in cash (Tr. 611, 621). Two of the employees acknowledged that they had borrowed money from petitioner but testified that loan repayments were deducted from their salaries each payday (Tr. 53, 65-66). Martinez testified that he had bought several old cars from petitioner but asserted that the amount of his debt as alleged by petitioner was not even approximately correct (Tr. 198-199, 219-221).

2. The evidence relevant to the wage and hour violations revealed that petitioner failed to pay his employees in accordance with the actual time worked. Each of the employees named in the information testified that he worked between 10 and 30 more hours per week than petitioner recorded. The employees were paid for the hours recorded at the rate of $1 per hour and $1.50 per hour overtime (Tr. 105-106, 114-117, 164, 165, 179, 245-246).

3. Petitioner claimed that he was a retailer exempt from the coverage of the Act under Section 213(a)(2) on the ground that at least 75% of his sales were not for resale and were recognized as retail sales in the industry.

Petitioner's California sales tax returns showed that the following percentages of sales were reported as non-taxable (*i.e.*, sales made for resale to a person with a tax-exempt number): 28.6%, 1957; 23.7%, 1958; 28.6%, 1959; 24.1%, 1960; 25.3%, 1961 (Tr. 389-398, 561-562). Petitioner and his expert witness, a professor of marketing, testified that they estimated 15% to 25% of the non-taxable sales were in reality retail sales because they were purchases for personal use by holders of tax-exempt certificates (Tr. 391-392, 419-420). In addition to including this estimated percentage of non-taxable sales in the retail category, petitioner's expert testified that he included all taxable sales without determining whether any of these might in fact have been wholesale (*e.g.*, to a Mexican garage or an industrial purchaser) under his definition of that term (Tr. 429-430, 433-434). A former employee testified that petitioner made sales to nearby Mexican garages, which were charged the sales tax (Tr. 582-583).

ARGUMENT

1. Petitioner contends (Pet. 10-12) that his scrap metal sales amounted to only a *de minimis* portion of his gross sales and that, therefore, his employees were not covered by the Fair Labor Standards Act. The wrecking of cars for scrap was, however, a regular and continuing part of petitioner's business of selling used auto parts from wrecked cars.[3] This Court has pointed

[3] The wage and hour provisions of the Act apply to employees engaged in the "production of goods for commerce" (29 U.S.C. 206, 207). The actual sale of the scrap, which

out that there is no *de minimis* test under the Fair Labor Standards Act when there are regularly recurring sales in interstate commerce because Congress has made no distinction based on volume. See *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178, 181, wherein the Act was applied to a newspaper whose daily circulation of approximately 10,000 included an out-of-state distribution of about 45 papers a day. See also *United States* v. *Darby*, 312 U.S. 100, 123; *Mitchell* v. *Jaffe*, 261 F.2d 883 (C.A. 5); *Tilbury* v. *Rogers*, 123 F.Supp. 109 (W.D. La.), affirmed, 220 F.2d 757 (C.A. 5), certiorari denied, 350 U.S. 839; *Cooper* v. *Gas Corp.*, 1 Wage and Hour Cases 1119, 1122 (Mich. Cir. Ct.).

2. Petitioner's argument (Pet. 12-13) that the government failed to prove the violations by "work week" is without merit. Several employees testified that they hauled scrap *weekly* and that they stripped cars for parts as a regular function of the business (Tr. 93-95, 160, 166-167, 175-176, 388). As we have noted (*supra*, n. 3), this type of activity has been held to be the "production of goods for commerce," and thus within the wage and hour provisions of the Act. Since petitioner's scrap sales were not a separate part of

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employees testified occurred weekly, was only a part of the "production of goods for commerce," under the Act. Employee activity in picking up wrecked cars and stripping them of their reusable parts has consistently been held to be part of the "production of goods for commerce." See, *e.g.*, *Mitchell* v. *Jaffe*, 261 F. 2d 883, 887 (C.A. 5); *Goldberg* v. *Fritschy*, 198 F. Supp. 743, 745 (W.D.N.C.), reversed on other grounds *sub nom. Wirtz* v. *Du Mont*, 309 F. 2d 152 (C.A. 4); *Mitchell* v. *Douglas Auto Parts Co.*, 11 Wage and Hour Cases 807, 809 (N.D. Ill.) (not officially reported).

the business for which his employees were separately paid, the testimony as to the employees' duties combined with the testimony of weekly underpayment was sufficient to prove violations with respect to payments by work week.

In any event, it is well established that when employment has been shown to be covered, as in the instant case, the burden is on the employer to show that the employees were not covered during particular work weeks. See *Hagan* v. *Goldberg*, 291 F. 2d 249, 251 (C.A. 9); *Guess* v. *Montague*, 140 F. 2d 500, 504 (C.A. 4); *Mitchell* v. *Owen*, 292 F. 2d 71, 78-79 (C.A. 6). See also *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680. In the absence of any testimony tending to negate the affirmative proof offered by the government, the jury was clearly justified in finding that petitioner regularly violated the Act. Since the question at issue here was whether petitioner had willfully violated the Act and not the amount due a particular employee in a particular week, proof of systematic violation was clearly sufficient.

3. Petitioner contends that the determination whether he qualified for the retail exemption was improperly treated as a question of fact (Pet. 13-15). But, in this case, that determination depended on a finding as to whether 75% of petitioner's sales were retail; this in turn depended on the jury's evaluation of the credibility of petitioner and his expert witness and an appraisal of the factual premises on which their testimony rested. The jury, which was properly instructed on the meaning of "retail sale," was

free to disregard the expert testimony if it found it to be based upon inadequate or improper examination.[4]

Moreover, petitioner agreed in the trial court that the exemption issue in this case was a question of fact for the jury (Tr. 666, 668). He did not ask the judge to make a ruling on the exemption as a question of law and may not now—after the jury determination to which he agreed produced an unfavorable result—claim the right to such a ruling.

4. That conviction may depend on factual issues and that there may be "borderline" cases does not, as petitioner contends, render the Act with the retail exemption too vague to be the basis of a criminal prosecution. See *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32-33, and cases cited. The statute sets forth a specific definition of the retail exemption which has been supplemented by Department of Labor regulations giving precise definitions and examples of retail establishments. See 29 C.F.R. 779.300-779.398. As this Court stated in *United States* v. *Darby*, 312 U.S. 100, 125-126:

> One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines is warned that he may be subject to the criminal penalties of the Act.

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[4] In the instant case the jury might well have disregarded the expert's testimony because he admitted that he did not examine *any* sale that was taxed (Tr. 429-430, 433-434). See *Rudin* v. *United States*, 254 F. 2d 45 (C.A. 6), certiorari denied, 357 U.S. 930; *Dusky* v. *United States*, 295 F. 2d 743, 754 (C.A. 8), certiorari denied, 368 U.S. 998; *Holm* v. *United States*, 325 F. 2d 44, 46 (C.A. 9).

Petitioner, who conceded the application of the Act to his business in the 1958 contempt order, was well aware that his conduct was proscribed by the Act.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1966.

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[5] Petitioner raises but does not argue two additional questions (Pet. 4, questions 5(a) and 5(b)). As to the first, the bona fides of petitioner's set-offs was challenged by each of the employees named in count 1 (see Statement, supra, pp. 4-5). In the second question, petitioner appears to attack the Department's policy of requiring written receipts from employees to attest to the taking of set-offs. But this policy is not properly in issue in the present case because the court instructed the jury that, if the employees acknowledged the set-off of their alleged debts *in any form*, petitioner should be found not guilty on count 1 (Tr. 814).

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